Supreme Court, U.S.
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92-2028

No.

SUPREME COURT OF THE UNITED STATES

October Term, 1992

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FRANK PAGANUCCI, et al.,

Petitioners,

v.

THE CITY OF NEW YORK, DOUGLAS WHITE, Personnel Director of the City of New York, THE NEW YORK CITY DEPARTMENT OF PERSONNEL, LEE BROWN, Police Commissioner of the City of New York, and the POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents,

and

HISPANIC SOCITY OF THE NEW YORK CITY POLICE DEPARTMENT and GUARDIANS ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Intervenor-Respondents

(Full Caption Infra)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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BEST AVAILABLE COPY

I. QUESTIONS PRESENTED FOR REVIEW

1. Is the imposition of FRCivP. Rule 11 sanctions in cases in which a governmental entity is a defendant, an unconstitutional imposition of a penalty for the exercise of the Redress of Grievances component of the First Amendment.

2. If, as a result of state litigation and appeal, grades are changed on a competitive promotion examination, resulting in passing scores for some minority candidates theretofore promoted pursuant to a Title VII settlement based on alleged racial discrimination, have higher-scoring candidates who were not made parties, raised an inference that the original failing grades may not have been caused by racial discrimination, and is that inference sufficient to defeat a motion for summary judgment made by a public employer who

justifies promoting those lower-scoring minority candidates pursuant to the consent decree to the exclusion of the higher-scoring candidates who claim denial of equal protection of the laws.

3. As opposed to entry level examinations, should this court re-examine the legality, in an Equal Protection of the Laws sense, of public employers using a separate but equal racial classification provided for in a Title VII court litigation settlement between the public employer and some of its employees, to promote lower scoring minority candidates to the exclusion of non-party higher scoring candidates on the same competitive promotion examination where all candidates went to the same academy, had the same training and salary, had to put in the same number of years in order to qualify for the examination.

II. PARTIES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

FRANK PAGANUCCI, MORT ADLER, AUGUSTINE ALOIA, LOUIS C. AMEN, LINDA M. ANDERSON, ALFONSO ANDOSCA, SALVATORE ARDIZZONE, ROBERT ARLUCK, MICHAEL ARMSTRONG, JOSEPH AVERSO, DESMOND P. DAILEY, S. BALESTRIERI, JAMES W. BARD, DANIEL BARKER, KEVIN BARRY, JOSEPH BATTAGLIA, NICHOLAS N. BATTISTA, ANTHONY H. BENVENUTO, KEN BERGMAN, FRANK BERGSTOL, THOMAS P. BLAKE, FRANCIS BOSTELMAN, JOSEPH O. BROUSSEAU, MICHAEL F. BRUNO, JOSEPH BUFFOLINO, KEVIN R. BURTON, JOHN BUTLER, RALPH CAIOLEO, PETER CALABRESE, ANTHONY CALANDRILLO, DONALD CALDERONE, LAWRENCE R. CALLAHAN, KENNETH G. CALVEY, MICHAEL CAMPBELL, WILLIAM CANARY, NOREEN CANAVAN, MICHAEL CARDILLO, MICHAEL CAREY JOHN CARNEY, PHILIP CARTER, ROBERT CHAMBERS, FRANK F. CHIN, JAMES CIACCIA, ROBERT CLANCY, ROBERT E. FRANK, PATRICIA COLLINS, ANTHONY CONCIALDI, SALVATORE CONSTRASTANO, THERESA COYLE, THOMAS R. COYNE, WILLIAM T.DAILY, GARY S. DAVIS, ROBERT J. DE MARTINO, ROBERT E. DEAN, MATTHEW DELLA PERUTA, MICHAEL J. DEVITA, MICHAEL A. DIGILIO, JOSEPH DI PAOLO, STEVEN J. DIGIORGI, RICHARD DILLON, JOHN J. DONNELLY, DAVID K. DUBARRY, THOMAS J. DUNNE, DENNIS EMPOROR, DANIEL ENGEL, PATRICIA ESPINOSA, ANIELLO M. FALANGA, ROBERT FECHER, TIMOTHY H. FINN, JR., MICHAEL FISCINA, ALAN I. FISCHER, TODD FISHER, GARY J. FITZGERALD, THERESA H. FOILES, ROBERT V. FOLEY, NORMAN R. FORD, FRANK FORTE, RICHARD FRICK, KARL GABRIELSEN, FRANK GAETANI, RAYMOND GALLAGHER, FRANK GALLIPANI, SCOTT A. GALLO, JULIA GARATE, JOHN GEARY, RONALD GEORGE, JOSEPH P. GIOCONDO, STEPHEN GIUNTINI, WILLIAM

GOELLNER, CHARLES GOETZ, GEORGE GORMAN, DEBRA A. GRAHAME, ANGELO GRANIERO, JOHN V. GRIMES, SUSAN A. HAAS, WILLIAM P. HANLEY, ROBERT G. HARNISCHFEGER, DAVID W. HANSEN, GERARD F. HARRIS, GEOFFREY HART, EDWARD F. HAYES, JAMES G. HEANEY, ROGER F. HECHT, RONALD HIGGINS, WILLIAM HIGGINS, LILLIELYN HIRSCH, LEE C. HOM, CATHERINE H. HULL, DENNIS HULL, LEO ITZKOWITZ, STEVEN JANOVICI, JOSEPH JASINSKI, CATHERINE A. JAY, PAMELA A. JOHNSON, ROBERT J. JORDAN, TIMOTHY P. KANE, FRANCIS J. KEATING, KEVIN KEENAN, TIMOTHY KELLY, PATRICK J. KENNY, WILLIAM J. KINZLER, ROBERT KJARBO, STEPHEN H. KLEIMANN, ROBERT A. KLOOS, KEVEN J. KOCIK, JOHN J. LANIGAN, CHARLES J. LAPPE, PAUL D. LAWRENCE, JAMES T. LIEN, THOMAS W. LIND, MICHAEL S. LITTMAN, JOHN J. LOHSE, ANTHONY LOMBARDO, GEORGE F. LOSONCI, NICHOLAS J. LUCIANO, WILLIAM LUKAS, JAMES T. LYNCH, JOHN E. MAGEE, GEORGE MALLON, RALPH MARCHITELLI, JOHN MASSA, CHRISTOPHER MATEJOV, ROBERT C. MAUTSCHKE EDWARD J. MAY, CHARLES McBRIDE, DENNIS McCABE, TERRANCE McCABE, THOMAS F. McCABE, FRANK McDANIEL, DENNIS J. McDONALD, THOMAS P. McFAZEN, FRANK J. McGUIRE, WILLIAM MCLAUGHLIN, PHILIP McNERNEY, EDMOND McTIGUE, JUAN B. MENDEZ KENNETH MERINGOLD, WLLIAM P. MOLLY, THOMAS MONTERO, JAMES MOOD, JOHN A. MOSCHELLA, BRUCE MURPHY, MICHAEL NEARY, MICHAEL D. NEMOYTEN, JOHN T. NICKLES, STEPHEN NICOTRA, EDWARD J. NOVAK, EDMOND NUGENT, KEVIN T. O'CONNOR, NANCY L. O'CONNOR, PATRICK F. O'CONNOR, JAMES J. O'DONOGHUE, TIMOTHY O'KEEFE, WALTER O'KEEFE, JOHN O'MALLEY, JAMES O'REILLY, ALLYSON G. OPIS, STEVEN D. OSOFSKY, ALAN R. OSTOITS, MARK N. OUNDERKIRK, WILLIAM G. OWEN, JOHN A. PALLADINO, DAVID J. PANETTA, SAMUEL PANUCCIO, THOMAS PAPPAS, NICHOLAS PAQUARELLO, MICHAEL PASQUALE, JOSEPH G. PASTORINO, NICKY PATARIU, ANTHONY PAULINE, ARTHUR

PEASLER, JOSEPH PENTANGELO, MARK PETTERSON, ROBERT PEYER, ANTHONY PERKINS, ANTONY PEZZULO, RAYMOND M. PIERCE, LOUIS PIOLI, JOSEPH POLLACK, LARRY PRAINO, CHRISTOS PRIVOLOS RICHARD A. RAGGO, STEPHEN RALKO, JOSEPH C. RASENBERGER, CHARLES F. REGAN, EILEEN REGAN, GEORGE REYNOLDS, FRANCISCO RIOS, THOMAS G. RODAHAN, BENJAMIN ROMANO, WILLIAM ROMANO, JAMES R. ROGETTI, THOMAS V. ROSA, JOHN RUSSO, MICHAEL J. RYAN, THOMAS F. RYAN, MICHAEL RYDER, LEONARDO A. SALERNO, JERRY SALTZMAN, WARREN SAM, MARIANNE C. SAMOTHRAKIS, VINCENT L. SANSERVERINO, FRANK A. SANTAROMITA, RONALD G. SCALZO, STANLEY SCHIFFMAN, CRAIG H. SCHROEDER, MICHAEL SEIDEL, FREDERICK J. SERIO, ROBERT J. SEUBERT, RICHARD SEVERI, WILLIAM G. SLANE, JOSEPH SMIGIEL, ANN R. SOWINSKI, ROBERT SPADACCINI, JOHN SPADARO, GUSTAVO SPAROVICH, LOUIS TELANO, DENNIS J. TERMINELLO, WILLIAM TESLER, CHARLES G. THIEMER, ROBERT TOBUCK, JANET M. TODD-DECKER, CHRISTOPHER P. TORF, MICHAEL TRIMIS, JOHN TURJAK, ROBERT J. UHL, PETER R. VAN WYGERDEN, STEPHEN J. VARGA, RALPH J. VISCIO, WALTER VOSS, JOHN VOTTA II, MICHAEL B. WAGNER, BRIAN WALSH, MICHAEL V. WANG, STEPHEN J. WAWRYK, GREGORY WELCH, ROBERT WILLIAMSON, JOHN WYNNE, ROBERT J. YACKEL, GREGORY J. ZOFREA, HOWARD ALLEN, GARY BERMAN, STEVEN CAIROK, JOSEPH CONCANNON, MICHAEL CONNOLLY, MAURICE DEVITO, ARTHUR FLYNN, KEVIN GRASSING, JAMES C. KELLY, THOMAS P. KELLY, STEVEN KUBICK, ROBERT B. LANGER, HENRY MAHNCKE, JOHN MARCONE, JOHN MAZZOCCHI, PATRICK McGINNIS, SERGIO MIKLUS, KENNETH NILSEN, HENRY PALAYO, ANTHONY REITANO, ROBERT A. SOWINSI, JOSEPH TORRAGROSA, RICHARD SEVIERI, KEVIN SWEENY, RUBIN RIVERA, ALAN MAY, MARC WOLF, WILLIAM SAUNIER, ANTHONY P. CONTENTO, DOMINICK PETRUCELLI, FREDERICK TERMINI, KEVIN

RYAN, FLORENCE CIAFONNE and SAMUEL RIVER,

Petitioners,

-against-

THE CITY OF NEW YORK, DOUGLAS WHITE, Personnel Director of the City of New York, THE NEW YORK CITY DEPARTMENT OF PERSONNEL, LEE BROWN Police Commissioner of the City of New YOrk and the POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents,

and

HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT and GUARDIANS ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Invervenor-Respondents.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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IV. OPINIONS BELOW

The United States District Court for the Southern District of New York (Ward, J.) in an opinion dated March 10, 1992 granted summary judgment dismissing the complaint to the defendants and awarded partial FRCivP Rule 11 Sanctions to them. The case is reported at 785 F.Supp. 467, and is reproduced at A13.

The United States Court of Appeals affirmed the district court by a decision rendered May 17, 1993 under Docket No. 92-9109. It is reproduced at A1. Its citation is ___F2d ____(2d Cir.1993).

V. JURISDICTIONAL STATEMENT

This petition seeks review of the United States District Court, Southern District of New York, dated March 10, 1992 awarding summary judgment to the defendants dismissing the complaint and awarding partial Rule 11 sanctions, which fully disposed of the issues

between the parties, (A13) and the decision and judgment of the United States Court of Appeals, Second Circuit dated May 17, 1993 affirming the district court. (A1, A12))

Jurisdiction of the District Court was based on 42 U.S.C. §1983; 28 U.S.C. §§1343(a)(3), 1343(a)(4).

The issue of violation of the Fourteenth Amendment to United States Constitution equal protection of the laws component (A27) and the issue of whether the imposition of FRCivP Rule 11 sanctions was an unconstitutional imposition of a penalty for the exercise of the right to petition for redress of grievances under the First Amendment where the defendant is a public entity (A54) were raised in the district court.

Those issues were raised in the United States Court of Appeals for the Second Circuit. (A7-A8).

The jurisdiction of this court is pursuant to 28 U.S.C. §1254. This petition is filed within 90 days of entry of judgment of the Court of Appeals for the Second Circuit. (A12)

VI. CONSTITUTIONAL PROVISIONS AND LAWS.

Constitution, 14th Amendment:..No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, lberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Constitution, Art. I §6: Appointment and promotions in the civil service of the state and all of the civil divisions thereof...shall be made according to merit and fitness to be ascertained insofar as practicable, by examination which as far as practicable, shall be competitive...

VII STATEMENT OF THE CASE.

The Petitioners are members of the New York City Police Department who competed in the 1983 Police Sergeant Examination but were not promoted. Other minority candidates with grades equivalent to or lower than the petitioners were promoted pursuant to a Title VII settlement of litigation in the U.S. District Court, Southern District of New York to which none of the petitioners were parties. That case is Hispanic Society of the New York Police Dep't v New York City Police Department, Index No. 84 Civ 6628 (RLC) (U.S. Dist. Ct. S.D.N.Y., Carter, J.), 42 Fair Empl. Prac. Cas. (BNA) 905, 40 Empl. Prac. Dec. (CCH) Par. 36, 385 (S.D.N.Y. 1986), aff'd 806 F.2d 1147 (2d Cir. 1986), aff'd sub nom Costello v New York City Police Department, 484 U.S. 301,

reh'g denied 484 U.S. 1082 (1988).

Promotions pursuant to the settlement were made in November, 1985. In December, 1985, 54 of the Petitioners herein joined with other candidates in a separate action, Marino v Ortiz, Index No. 85 Civ 60067, (U.S. District Court, S.D.N.Y., Carter, J.), aff'd 806 F.2d 1144 (2d Cir.1986), aff'd by an equally divided court 484 U.S. 301 (per curiam), reh'g denied, 484 U.S. 1082 (1988), pet for reh'g denied 888 F2d 12 (2d Cir.1989), cert denied, 110 S. Ct. 2172 (1990), contending that as they had grades equivalent to or higher than the minority candidates promoted on the same competitive examination, they had been denied equal protection of the laws in violation of the 14th Amendment. (A22). The parties in Hispanic had not joined any of the Petitioners herein in that action under FRCivP Rule 19, nor had the Petitioners intervened in therein.

At a fairness hearing, all of the Marino plaintiffs and other candidates, some, but not all of whom are Petitioners herein, hereinafter called the "Costello Objectors" asserted that as this was a competitive examination and they had outscored those theretofore promoted under the interim order, they had been denied equal protection of the laws (A21).

During the course of the Marino and Hispanic litigations, some, but not all of the petitioners herein instituted an action in Supreme Court, County of New York, in the case of Allen v Ortiz, 137 A.d.2d 424, 524 N.Y.S.2d 442 (App. Div. 1st Dep't 1988) (25-26, A47) That case alleged that the examiners failed go give credit to some of the answers to various questions which were as good as or better than the key answers.

The trial court ordered eleven changes, The city did not appeal Allen. The Allen litigants appealed still further and garnered one additional change.

As a result of this State litigation, some, but not all of the Marino plaintiffs, some, but not all of the Costello Objectors in Hispanic, some, but not all of the minorities theretofore claiming racial discrimination caused their failing grade and promoted by reason of the Hispanic settlement and some, but not all of the Petitioners herein, attained, on their own merits, a passing grade. A series of promotions resulting therefrom were made, the last, occurring on or about May, 1988. Additional black and Hispanic police officers were also promoted in order to maintain the proportion of minority police officers promoted pursuant to the Hispanic Society settlement. It was not until July 22, 1991 by affidavit of Francis

Smith, that the City determined in response to a question at argument of the motion in June, 1991, in the district court, that Black officers made up 3.94% and Hispanics made up 5.56% of the revised list. (A26).

The state litigation was ongoing during the Hispanic and Marino litigations. Judge Carter dismissed the complaint in Marino as an impermissible collateral attack on the Hispanic settlement. He approved the settlement in Hispanic and rejected the objections of the Marino and Costello objectors.

In all litigations discussed so far all plaintiffs and petitioners and objectors were represented by attorney Ronald Podolsky, who also is submitting this Petition on behalf of the Petitioners.

The Second Circuit affirmed Marino at and dismissed the appeal by the Costello objectors on the grounds

that since they never intervened, they were not parties to Hispanic and hence had no standing to appeal. This court affirmed by and equally divided court the holding in Marino and affirmed the dismissal of the appeal by the 2d Circuit in Hispanic sub nom Costello v New York City Police Department, 484 US 301 (1988).

In May, 1988 as a result of the changes wrought by the state litigation in Allen, there was a rescoring of the examination and additional promotions were made. Because of perceived continued disparate impact, still further minorities with grades lower than those of the Petitioners herein were promoted, along with those Petitioners who passed by reason of the changes.

Some of the minority candidates who originally claimed that they had failed the examination by reason of racial discrimination and had been promoted

under the Hispanic consent settlement quota to sergeant in November, 1985 before the results in Allen were announced now had passing grades on their own merit. (A60, A47)

Following this Court's affirmance of Marino by an equally divided court in 1908, this Court decided the case of Martin v Wilks, 490 U.S. 755 (1989) which held that collateral attacks on Title VII racial settlements were authorized, in cases where persons affected by consent decrees were not joined under FRCivP Rule 19. This court rejected the concept of mandatory intervention under Rule 24.

The Marino litigants then applied for an opportunity to argue the point that the dismissal of their complaint on the grounds that it was an impermissible collateral attack on a Title VII settlement should be vacated and that the case should

proceed to trial. The 2d Circuit denied the application for an extension of time to made such argument and this court denied certiorari. The other petitioners herein were still not parties in Marino.

When it developed that, under the changes wrought by Allen still further minorities were being promoted with grades lower than those of the Petitioners herein, and that some of the minority candidates who had theretofore claimed that they had failed the examination by reason of racial discrimination now had a passing grade on their own corrected scores, and that collateral attacks were permitted, this litigation was instituted. It addressed the Allen promotions of May, 1988 The present litigation is by candidates, some of whom were Marino litigants, some of whom were Costello objectors, some of whom were Petitioners in Allen and some of whom were not prior litigants or

objectors in any forum. None of the Petitioners had been made parties to Hispanic by the litigants in that case.

The United States District Court for the Southern District of New York (Ward, J.) in an opinion dated March 10, 1992 granted summary judgment dismissing the complaint to the defendants and awarded partial FRCivP Rule 11 Sanctions to them on res judicata with respect to 54 of the petitioners who were Marino plaintiffs. 785 F.Supp. 467. (A53)

The United States Court of Appeals affirmed the district court by a decision rendered May 17, 1993 under Docket No. 92-9109. It is reproduced at A1. Its citation is ___F2d ____(2d Cir.1993). The Circuit Court declined the request of the intervenors for sanctions for prosecution of the appeal by the

Petitioners. (All).

VIII. REASONS FOR GRANTING THE WRIT

(a) Sanctions. Petitioners contended below that the imposition of sanctions in cases where the defendant is a governmental entity is the attachment of a penalty to the exercise of the constitutional right to Petition for Redress of Grievances under the First Amendment to the United States Constitution.

Under New York Constitution, Art V, §6, promotions to competitive civil service ranks is to be based upon merit and fitness, to be determined insofar as is practicable by competitive examination. This is the definition of Equal Protection of the Laws in New York insofar as promotions are concerned. Here Petitioners have a grade equivalent to or higher than other candidates who were promoted by the employment of an alleged separate but equal racial

classification, and Petitioners were excluded from the promotion. This was a promotion examination and not entry level. All candidates went to the same academy, received the same training, had to put in the same number of years as police officer before being qualified to take the examination, and all had the same opportunity to prepare for the examination. Because of these considerations, Petitioners had a grievance. This suit was a petition for redress of grievances fully authorized under the First Amendment to the United States Constitution.

The First Amendment does not limit the term "grievance" to well founded grievances, such as the one at bar, and Rule 11 was not designed to thwart the exercise of this constitutional right. If a defendant is a private individual, arguably

sanctions could be imposed because the First Amendment addresses governmental and not private action.

Although sanctions in cases against governmental have been awarded in the past, they have been sustained on the theory of alleged frivolity of the complaint and the issue of the imposition of a penalty for the exercise of a the constitutional right to petition for redress of grievances concept has not been asserted.

In Eastway Construction Corp. v City of New York,, 762 F2d 243 (2d Cir. 1985) the court, in discussing the standard to be applied in determining the propriety of the awarding of sanctions observed at 254:

> In framing this standard we do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to have challenged the received wisdom and a rule that penalizes such innovation

> and industry would run counter to our notions of the common law itself. Courts must strive to avoid the wisdom of hindsight in determining whether a pleading is valid when signed and any and all doubts must be resolved in favor of the signer.

As this standard exceeds even the criminal law standard of beyond a reasonable doubt, it would appear that not only was the court in error because the imposition of sanctions in cases against governmental defendants is an unconstitutional violation of the First Amendment right to petition for redress of grievances, and did not meet the court's own definition of frivolity as well.

These petitioners outscored persons on the same competitive promotion examination. A "separate but equal" racial classification was superimposed upon the results of this

promotion examination. Such separate but equal racial classifications in promotion contexts appear to violate the holding in Brown v Bd. of Education, 347 U.S. 483 (1954), Although such classifications have been upheld in the past, the 29 year period since Brown and the results in this case of having quota sergeants who actually passed on their own merit, would invite a re-examination of whether such separate but equal classifications should be confined to entry level venues. The courts below also based the sanctions on the theory that there had been a "change in the law" wrought by Martin v Wilks, supra. (A7, A34). FrCivP Rules 19 and 24 had not changed. Wilks recognized that to bind one to the results of litigation, one must be made a party and that there was no requirement of mandatory intervention under Rule 24. It is clearly logical that a consent decree by

definition binds only those who consent thereto. It was only in 1992 that the law was changed by Congress to thwart the due process rights of non-parties by requiring mandatory intervention in this type of a case.

In Dixon v District of Columbia, 394 F.2d 966, 968 (D.C. Cir.1967) a dismissal of a criminal action was contingent upon the defendant releasing the police from any claim of violation of constitutional rights implicated in the arrest. When suit was brought on such claim, the defense of release was stricken. The court observed that:

> ... The government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances.

Justice Thurgood Marshall, as an attorney was faced with the authority of the Supreme Court of the United

States under Plesssy v Furgeson, 163 U.S. 537 (1896), that separate but equal racial classifications in public accommodation and other contexts were valid. Yet he proceeded in Brown v Bd of Education, supra, despite this clear and athoritive precedent to demonstrate that separate but equal is inherently unequal. Had he or his clients been theatened with sanctions, or had they been imposed, the matter might not have reached its ultimate conclusion.

In 1964 the author was asked by a police officer to represent him in a situation wherein he had been asked to sign a waiver of immunity an testify before a grand jury upon pain of dismissal for refusing to do so. Provisions of the then relevant New York Constitution and New York City Charter provisions clearly specified that if the police officer did not sign the waiver he would be immediately dismissed. The

officer refused and was dismissed. All five justices of the New York Supreme Court, Appellate Division First Department confirmed the dismissal, and all seven judges of the New York Court of Appeals affirmed.

In light of the clear terms of the statutory requirements and the unanimous opinion of 12 state judges, one would have reason to conclude that to proceed further would be frivolous. The author appealed to this court which unanimously reversed. Gardner v Broderick, 392 U.S. 273 (1968).

A penalty cannot attach to the exercise of a constitutional right. Had the author or his client been threatened with sanctions, or had they been imposed by an intermediate court, the petition for redress of grievances might well have been

thwarted and its ultimate result never achieved.

Certiorari should be granted in this case in order to define whether or not the imposition of sanctions in a case wherein a govenmental agency is a defendant constitutes a penalty for the exercie of the constitutional right to petition for redress of grievances in violation of the First Amendment to the United States Constitution.

(b) Summary judgment

The district court granted summary judgemnet based upon the Hispanic settlement. The district court mentioned the Allen decision in its opinion but did not address the fact that some of the minorities theretofore promoted under the Hispanic settlement on the grounds that they had been racially discriminated against actually had a passing grade as a result of the the Allen rescoring. (A25-A26,A47). The

court of appeals did not mention the Allen decision, but incorporated the district court opinion (A8-A9).

The situation thus developed that some minority sergeants heretofore viewed as "quota sergeants" are stigmatized because it has been judicialy determined after trial and appeal in the state court that they were not racially discriminated against, and had in fact passed the examination by reason of their original answers.

This state of affairs not only has the effect of undermining the contention of the minority candidates in Hispanic that they had failed the examination by reason of racial discrimination, but shows the ultimate effect of superimposing a "separate but equal" racial classification to employment, housing, and education venues.

The district court was in error in granting summary jugment. Respondents had justified the May 1988 promotions based upon the Hispanic settlement to which no petitioner herein was a party. Allen set forth the logical conclusion that there was an issue of fact whether something other than discrimination caused the racial disparity.

The district court and court of appeals made much of the fact that many petitioners herein had knowledge of the Hispanic litigation and had an opportunity to intervene therein. This court held in Martin v Wilks , supra, that joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.

In Griggs v Duke Power Co., 401 U.S. 424 (1971),this court stated that

if disparate impact is demonstrated and it can be shown that the employer's activities or practices are responsible for it, a cognizable inference of employment racial discrimination under Title VII can be drawn. It is a claim that can be rebutted. The question here is whether this cogzizable inference rises to the level of extinguishment of a question of fact to be tried, especially where, as here, the inability of the employer to correctly grade the examination in the first instance was an alternate inference to be drawn from the statistical disparity.

Title VII plaintiffs can use statistics, to show disparate impact, but then must demonstrate which practice of the employer is responsible for the disparity. It is

only then that a prima facia case is made out.

Prima facia is not a sufficient standard upon which to found an order granting summary judgment. In this case, it is the employer who is defending the employment of a "separate but equal" racial classification in promotion decisions.

It is now 29 years after this Court declared separate but equal racial classifications as inherently unequal and hence unconstitutional. Although arguably such classification might be justified in entry level employment situations, once the individuals become employees, they have embarked on a career path expectation that includes going to the same academy, receiving the same training and salary, putting in the same number of minimun years in order to be eligible for promotion, having the same opportunity to prepare for the

examination.

The courts below have by their decisions indicated that separate but equal racial classifications in employment promotion situations are appropriate, and have relied on prior precedents of this Court in so doing.

Just as the precedent of Plessy v Furgeson was overturned by Brown v Bd. of Education, holding that separate but equal racial classifications are inherently unequal, so too should this Court re-examine the continued use of separate but equal racial classifications in employment promotion situations. This is an issue of national importance which should be addressed by the Court.

CONCLUSION: THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully Submitted,

June 18 1983

Ronald Podolsky

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT Docket 92-9109

FRANK PAGANUCCI; ET AL.,
Plaintiffs-Appellants,
v.
THE CITY OF NEW YORK; DOUGLAS WHITE, Personnel Director of the City of New York; ET AL.,
Defendants-Appellees,
HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT and GUARDIANS ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,
Defendants-Intervenors-Appellees.

Docket No. 92-9109
Decided: May 17, 1993
Before: LUMBARD, MCLAUGHLIN, Circuit Judges, and DUFFY, District Judge.
Hon. Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

KEVIN THOMAS DUFFY, District Judge.

Plaintiffs Frank Paganucci, et al., appeal from an order of the United States District Court for the Southern District of New York, Robert J. Ward, Judge, granting summary judgment and dismissing the complaint herein and imposing sanctions against counsel for the plaintiffs who had appeared in a prior action and were barred by res

judicata from asserting the claims herein.

This action has its ultimate genesis in the June 1983 and April 1984 Civil Service Examination ("the Examination"), given to 11,899 candidates for promotion to the rank of sergeant in the New York City Police Department ("the Department"). Seeking 1,000 new sergeants, the Department compiled a promotion eligibility list ("Eligible List") from the results of the examination. The Eligible List, however, under-represented the percentage of black and Hispanic candidates who took the exam.

Subsequent litigation, initiated by the Hispanic Society of the New York City Police Department (the "Hispanic Society") and the Guardians Association of the Police Department of the City of New York (the "Guardians Association"), produced a stipulated settlement

modifying the Eligible List upon an agreement that the Examination had a disparate impact on the black and Hispanic candidates. Hispanic Society of the New York City Police Dep't v. New York City Police Dep't, 84 Civ. 6628 (RLC). The settlement agreement sought to eliminate the disparate impact by providing for the promotion of those officers already on the Eligible List, as well as the promotion of black and Hispanic candidates proportionate to black and Hispanic examinees. Judge Carter entered an interim order on November 27, 1985 approving this settlement.

On December 30, 1985, Ronald Podolsky, the attorney for the plaintiffs in this case, filed suit on behalf of a number of candidates who did not make the Eligible List, but who scored equal to or better than the lowest scoring minority candidate

promoted under the interim order. In that case, Marino v. Ortiz, which was also before Judge Carter, the plaintiffs contended that the proposed settlement deprived them of equal protection of the laws and, as such, violated the Fourteenth Amendment of the United States Constitution.

On April 17, 1986, the district court heard objections to the proposed settlement in Hispanic Society. Mr. Podolsky appeared at this hearing to file objections on behalf of white officers who had scored as high or higher than those minority officers who, under the settlement agreement, were to be advanced for promotion. On April 24, 1986, Judge Carter filed an endorsement dismissing the complaint in Marino v. Ortiz as an impermissible collateral attack on a consent decree. Subsequently, on June 16, 1986, Judge Carter filed an opinion approving the

Hispanic Society settlement and, accordingly, rejecting the arguments set forth by Mr. Podolsky on behalf of the objectors. Hispanic Society of the New York City Police Dep't v. New York City Police Dep't, 42 Fair Empl. Prac. Cas. (BNA) 905, 40 Empl. Prac. Dec. (CCH) P 36,385 (S.D.N.Y. 1986). Led by Mr. Podolsky, the plaintiffs in Marino, and the objecting non-party police officers in Hispanic Society, appealed.

On December 8, 1986, we issued decisions in Marino and Hispanic Society. In Marino, we affirmed the district court's decision dismissing the complaint as an impermissible collateral attack on a consent decree by individuals who could have intervened. Marino v. Ortiz, 806 F.2d 1144, 1147 (2d Cir. 1986). In Hispanic Society, we dismissed the appeal because the officers represented by Mr. Podolsky had never intervened in the case and,

therefore, had no standing to prosecute the appeal. Hispanic Society of the New York City Police Dep't v. New York City Police Dep't, 806 F.2d 1147, 1154 (2d Cir. 1986). An equally divided United States Supreme Court affirmed our decision in Marino and the Court unanimously upheld our decision in Hispanic Society. Marino v. Ortiz, 484 U.S. 301, 304, 98 L. Ed. 2d 629, 108 S. Ct. 586 (per curiam), reh'g denied, 484 U.S. 1082, 98 L. Ed. 2d 1026, 108 S. Ct. 1064 (1988).

The following year, the Supreme Court held that a collateral attack on a Title VII consent decree is permissible. Martin v. Wilks, 490 U.S. 755, 104 L. Ed. 2d 835, 109 S. Ct. 2180 (1989). Mr. Podolsky then moved on behalf of the Marino plaintiffs for an enlargement of time to file a petition for reargument. We denied that motion in an opinion, stating:

> ...the motion for an enlargement of time is nothing but an attempt to reopen a final judgment because of a subsequent change in the law. When we take the interest in finality of judgments, particularly those as old as the instantmatter, into account, we perceive no persuasive reason to reopen this matter. Movants . . were fully aware of the proceedings leading up to the consent decree in question and, viewing the proceedings as a whole, it is evident that this collateral attack was necessitated in part by their counsel's mistaken belief that they were parties to the class action. See Hispanic Soc'y, 806 F.2d at 1152-53. 888 F.2d 12, 13 (2d Cir. 1989), cert. denied, 495 U.S. 931, 109 L. Ed. 2d 501, 110 S. Ct. 2172 (1990).

Within days from the denial of certiorari, Mr. Podolsky filed the instant complaint against several Municipal defendants on behalf of present and former New York City police officers alleging violations of their Fourteenth Amendment rights. Specifically, plaintiffs alleged that because their scores on the Examination were equal to or better than the scores of some of the minority officers promoted in 1988 pursuant to the Hispanic Society consent decree, they

were deprived equal protection of the law. Fifty-seven of the plaintiffs were members of the plaintiff class in Marino v. Ortiz. Judge Ward permitted the Hispanic Society and the Guardians Association to intervene as defendants, and subsequently, all parties moved for summary judgment. In addition, the intervenors asked for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. The Municipal defendants also sought sanctions, but limited their request only in regard to those plaintiffs whose claims wee barred by res judicata. On March 10, 1992, Judge Ward granted summary judgment for the defendants, and awarded sanctions, in the form of attorneys fees and costs, against Mr. Podolsky, only, however, with respect to the issue of res judicata.

We affirm the district court's grant of summary judgment for substantially

the reasons set forth in Judge Ward's comprehensive opinion. Additionally, we affirm the district court's Rule 11 grant of attorney's fees and costs as to the issue of res judicata.

Primarily, Rule 11 seeks to discourage "dilatory and abusive litigation tactics and eliminate frivolous claims and defenses, thereby speeding up and reducing the costs of the litigation process." McMahon v. Shearson/American Express Inc., 896 F.2d 17, 21 (2d Cir. 1990). While the aim of the rule is true and clear, its varying objectives necessitate different standards of review in accordance with the violated aspect. In this Circuit, we review the buoyancy of legal arguments de novo. Id. Accordingly, the applicable test is whether a reasonably competent attorney would have acted similarly. Id. at 22.

The application of this objective standard to the instant case begs for affirmance of the sanctions. Mr. Podolsky's audacious attempt to revisit the Hispanic Society settlement as to those plaintiffs who also appeared in Marino and had their claims therein dismissed on the merits, is patently frivolous. Even a cursory review of the doctrine of res judicata would have so indicated. Furthermore, Mr. Podolsky has demonstrated an utter lack of regard in the face of repeated admonitions concerning the lack of merit of his claims and the perils of further pursuing them. n1 No court should have to endure such unreasonable and inappropriate conduct. Accordingly, the sanctions imposed by the district court on the issue of res judicata are affirmed.

The intervenor-appellees have also requested that we impose additional

sanctions on plaintiffs counsel pursuant to Rule 38 of the Federal Rules of Appellate Procedure. n2 While such sanctions are certainly warranted due to the fivolity of this appeal, we decline to impose those sanctions at this time.

n1 As we stated when we first passed on this matter back in 1986: Not only did appellants have notice of the proceedings in Hispanic Society and asuggestion to intervene therein, but they actually presented their claims at the objector hearing in that case. Judge Carter considered appellants' claims and found them to be without merit. Thus, the appellants had the opportunity to engage in the original lawsuit and actually presented their claims. As we have said in an analogous context, 'the efficient and fair administration of justice requires that litigation of an issue at some point come to an end. And for the appellant, who has had one opportunity already to contest the . . . order, the time to relitigate the issue has necessarily run.' Class v. Norton, 505 F.2d 123, 125 (2d Cir. 1974). Marino, 806 F.2d at 1147.

n2 Rule 38 of the Federal Rules of Appellate Procedure provides that "if a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Fed.R.App.P. 38.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United Staes Courthouse in the City of New York on the 17th day of May, one thousand nine hundred and ninety-three.

PRESENT: HON. J. EDWARD LUMBARD, HON. JOSEPH M. MCLAUGHLIN Circuit Judges. HON KEVIN THOMAS DUFFY, District Judge.*

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Docket 92-9109 Same Caption

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Appeal from the United States District Court fo the Southern District of New York.

This cause on to be heard on the transcript of record from the United Staes District Court fo the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby Ordered, Adjudged and Decreed that the Order of said district court be and it hereby is Affirmed in accordance with the opinion of this Court The request to impose additional sanctions on plaintiff's counsel pursuant to Rule 38 of the Federal Rules of Appellate Procedure is Denied.

ELAINE B. GOLDSMITH, Clerk.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

FRANK PAGANUCCI, MORT ADLER, AUGUSTINE ALOIA, LOUIS C. AMEN, LINDA M. ANDERSON, ALFONSO ANDOSCA, SALVATORE ARDIZZONE, ROBERT ARLUCK, MICHAEL ARMSTRONG, JOSEPH AVERSO, DESMOND P. DAILEY, S. BALESTRIERI, JAMES W. BARD, DANIEL BARKER, KEVIN BARRY, JOSEPH BATTAGLIA, NICHOLAS N. BATTISTA, ANTHONY H. BENVENUTO, KEN BERGMAN, FRANK BERGSTOL, THOMAS P. BLAKE, FRANCIS BOSTELMAN, JOSEPH O. BROUSSEAU, MICHAEL F. BRUNO, JOSEPH BUFFOLINO, KEVIN R. BURTON, JOHN BUTLER, RALPH CAIOLEO, PETER CALABRESE, ANTHONY CALANDRILLO, DONALD CALDERONE, LAWRENCE R. CALLAHAN, KENNETH G. CALVEY, MICHAEL CAMPBELL, WILLIAM CANARY, NOREEN CANAVAN, MICHAEL CARDILLO, MICHAEL CAREY JOHN CARNEY, PHILIP CARTER, ROBERT CHAMBERS, FRANK F. CHIN, JAMES CIACCIA, ROBERT CLANCY, ROBERT E. FRANK, PATRICIA COLLINS, ANTHONY CONCIALDI, SALVATORE CONSTRASTANO, THERESA COYLE, THOMAS R. COYNE, WILLIAM T.DAILY, GARY S. DAVIS, ROBERT J. DE MARTINO, ROBERT E. DEAN, MATTHEW DELLA PERUTA, MICHAEL J. DEVITA, MICHAEL A. DIGILIO, JOSEPH DI PAOLO, STEVEN J. DIGIORGI, RICHARD DILLON, JOHN J. DONNELLY, DAVID K. DUBARRY, THOMAS J. DUNNE, DENNIS EMPOROR, DANIEL ENGEL, PATRICIA ESPINOSA, ANIELLO M. FALANGA, ROBERT FECHER, TIMOTHY H. FINN, JR., MICHAEL FISCINA, ALAN I. FISCHER, TODD FISHER, GARY J. FITZGERALD, THERESA H. FOILES, ROBERT V. FOLEY, NORMAN R. FORD, FRANK FORTE, RICHARD FRICK, KARL GABRIELSEN, FRANK GAETANI, RAYMOND GALLAGHER, FRANK GALLIPANI, SCOTT A. GALLO, JULIA GARATE, JOHN GEARY, RONALD GEORGE, JOSEPH P. GIOCONDO, STEPHEN GIUNTINI, WILLIAM

GOELLNER, CHARLES GOETZ, GEORGE GORMAN, DEBRA A. GRAHAME, ANGELO GRANIERO, JOHN V. GRIMES, SUSAN A. HAAS, WILLIAM P. HANLEY, ROBERT G. HARNISCHFEGER, DAVID W. HANSEN, GERARD F. HARRIS, GEOFFREY HART, EDWARD F. HAYES, JAMES G. HEANEY, ROGER F. HECKT, RONALD HIGGINS, WILLIAM HIGGINS, LILLIELYN HIRSCH, LEE C. HOM, CATHERINE H. HULL, DENNIS HULL, LEO ITZKOWITZ, STEVEN JANOVICI, JOSEPH JASINSKI, CATHERINE A. JAY, PAMELA A. JOHNSON, ROBERT J. JORDAN, TIMOTHY P. KANE, FRANCIS J. KEATING, KEVIN KEENAN, TIMOTHY KELLY, PATRICK J. KENNY, WILLIAM J. KINZLER, ROBERT KJARBO, STEPHEN H. KLEIMANN, ROBERT A. KLOOS, KEVEN J. KOCIK, JOHN J. LANIGAN, CHARLES J. LAPPE, PAUL D. LAWRENCE, JAMES T. LIEN, THOMAS W. LIND, MICHAEL S. LITTMAN, JOHN J. LOHSE, ANTHONY LOMBARDO, GEORGE F. LOSONCI, NICHOLAS J. LUCIANO, WILLIAM LUKAS, JAMES T. LYNCH, JOHN E. MAGEE, GEORGE MALLON, RALPH MARCHITELLI, JOHN MASSA, CHRISTOPHER MATEJOV, ROBERT C. MAUTSCHKE EDWARD J. MAY, CHARLES McBRIDE, DENNIS McCABE, TERRANCE McCABE, THOMAS F. McCABE, FRANK McDANIEL, DENNIS J. McDONALD, THOMAS P. McFAZEN, FRANK J. McGUIRE, WILLIAM MCLAUGHLIN, PHILIP McNERNEY, EDMOND McTIGUE, JUAN B. MENDEZ KENNETH MERINGOLD, WLLIAM P. MOLLY, THOMAS MONTERO, JAMES MOOD, JOHN A. MOSCHELLA, BRUCE MURPHY, MICHAEL NEARY, MICHAEL D. NEMOYTEN, JOHN T. NICKLES, STEPHEN NICOTRA, EDWARD J. NOVAK, EDMOND NUGENT, KEVIN T. O'CONNOR, NANCY L. O'CONNOR, PATRICK F. O'CONNOR, JAMES J. O'DONOGHUE, TIMOTHY O'KEEFE, WALTER O'KEEFE, JOHN O'MALLEY, JAMES O'REILLY, ALLYSON G. OPIS, STEVEN D. OSOFSKY, ALAN R. OSTOITS, MARK N. OUNDERKIRK, WILLIAM G. OWEN, JOHN A. PALLADINO, DAVID J. PANETTA, SAMUEL PANUCCIO, THOMAS PAPPAS, NICHOLAS PAQUARELLO, MICHAEL PASQUALE, JOSEPH G. PASTORINO, NICKY PATARIU, ANTHONY PAULINE, ARTHUR

PEASLER, JOSEPH PENTANGELO, MARK PETTERSON, ROBERT PEYER, ANTHONY PERKINS, ANTONY PEZZULO, RAYMOND M. PIERCE, LOUIS PIOLI, JOSEPH POLLACK, LARRY PRAINO, CHRISTOS PRIVOLOS RICHARD A. RAGGO, STEPHEN RALKO, JOSEPH C. RASENBERGER, CHARLES F. REGAN, EILEEN REGAN, GEORGE REYNOLDS, FRANCISCO RIOS, THOMAS G. RODAHAN, BENJAMIN ROMANO, WILLIAM ROMANO, JAMES R. ROGETTI, THOMAS V. ROSA, JOHN RUSSO, MICHAEL J. RYAN, THOMAS F. RYAN, MICHAEL RYDER, LEONARDO A. SALERNO, JERRY SALTZMAN, WARREN SAM, MARIANNE C. SAMOTHRAKIS, VINCENT L. SANSERVERINO, FRANK A. SANTAROMITA, RONALD G. SCALZO, STANLEY SCHIFFMAN, CRAIG H. SCHROEDER, MICHAEL SEIDEL, FREDERICK J. SERIO, ROBERT J. SEUBERT, RICHARD SEVERI, WILLIAM G. SLANE, JOSEPH SMIGIEL, ANN R. SOWINSKI, ROBERT SPADACCINI, JOHN SPADARO, GUSTAVO SPAROVICH, LOUIS TELANO, DENNIS J. TERMINELLO, WILLIAM TESLER, CHARLES G. THIEMER, ROBERT TOBUCK, JANET M. TODD-DECKER, CHRISTOPHER P. TORF, MICHAEL TRIMIS, JOHN TURJAK, ROBERT J. UHL, PETER R. VAN WYGERDEN, STEPHEN J. VARGA, RALPH J. VISCIO, WALTER VOSS, JOHN VOTTA II, MICHAEL B. WAGNER, BRIAN WALSH, MICHAEL V. WANG, STEPHEN J. WAWRYK, GREGORY WELCH, ROBERT WILLIAMSON, JOHN WYNNE, ROBERT J. YACKEL, GREGORY J. ZOFREA, HOWARD ALLEN, GARY BERMAN, STEVEN CAIROK, JOSEPH CONCANNON, MICHAEL CONNOLLY, MAURICE DEVITO, ARTHUR FLYNN, KEVIN GRASSING, JAMES C. KELLY, THOMAS P. KELLY, STEVEN KUBICK, ROBERT B. LANGER, HENRY MAHNCKE, JOHN MARCONE, JOHN MAZZOCCHI, PATRICK McGINNIS, SERGIO MIKLUS, KENNETH NILSEN, HENRY PALAYO, ANTHONY REITANO, ROBERT A. SOWINSI, JOSEPH TORRAGROSA, RICHARD SEVIERI, KEVIN SWEENY, RUBIN RIVERA, ALAN MAY, MARC WOLF, WILLIAM SAUNIER, ANTHONY P. CONTENTO, DOMINICK PETRUCELLI, FREDERICK TERMINI, KEVIN

RYAN, FLORENCE CIAFFONE and SAMUEL REIVER,

Plaintiffs,

v.

THE CITY OF NEW YORK, DOUGLAS WHITE, Personnel Director of N.Y.C., THE N.Y.C. DEPT. OF PERSONNEL, LEE BROWN, Police Commissioner of N.Y.C., and THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Defendants.

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90 Civ. 1598 (RJW) March 10, 1992, WARD, District Judge.

Plaintiffs move, pursuant to Rule 56, Fed. R. Civ. P., for summary judgment. Defendants the City of New York; Douglas White, Personnel Director of New York City; New York City Department of Personnel; Lee Brown, Police Commissioner of New York City; and the [**2] Police Department of the City of New York ("Municipal Defendants") and intervening defendants Hispanic Society of the New York City Police Department ("Hispanic Society") and Guardians Association of the Police Department of the City of New York ("Guardians") (collectively, "Intervenors"), each

cross-move for an order denying plaintiffs' motion and awarding summary judgment to defendants and for an order imposing sanctions on plaintiffs. For the reasons that follow, plaintiffs' motion for summary judgment is denied and the cross-motions of Municipal Defendants and Intervenors for summary judgment are granted. Municipal Defendants' application for sanctions is granted and Intervenors' application for sanctions is granted in part and denied in part.

BACKGROUND

The relevant facts are not in dispute. Plaintiffs are present and former New York City police officers, all of whom took Civil Service Examination number 2548 for promotion to the rank of sergeant ("the Sergeant's Examination"). They assert that Municipal Defendants violated plaintiffs' Fourteenth Amendment rights

by promoting persons to sergeant who scored the same or lower than plaintiffs on the Sergeant's Examination while plaintiffs did not receive promotions. Municipal Defendants made the challenged promotions pursuant to a consent decree, settling litigation brought by black and Hispanic police officers, alleging that the Sergeant's Examination violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. @ 2000e et seq.

The New York City Police Department administered the Sergeant's Examination during June 1983 and April 1984. It was taken by 11,899 candidates for promotion to the rank of sergeant. The Department used the results of the examination to compile a list of officers eligible for promotion. Since the Department needed approximately 1,000 new sergeants at that time a cut-off point was established that would yield the appropriate number of candidates.

Although 12.3% of those who took the Sergeant's Examination were black and 8.7% were Hispanic, blacks and Hispanics made up only 2.31% and 4.23%, respectively, of those whose names were placed on the eligible list.

In the latter half of 1984, the Hispanic Society and the Guardians each brought lawsuits in this Court against the Police Department and other City defendants, alleging that the Sergeant's Examination and the resulting eligible list violated Title VII because the examination had a disparate impact on Hispanic and black candidates and was not job related. The two actions were eventually consolidated before the Honorable Robert L. Carter, in Hispanic Society of the New York City Police Dep't v. New York City Police Dep't, 84 Civ. 6628 (RLC). Groups representing officers on the eligible list were permitted to intervene as defendants, as

were various individuals and white ethnic societies representing officers who were not promoted.

Following discovery, city officials initiated discussions with the Hispanic Society plaintiffs, which resulted in a proposed settlement, which was then presented to the district court for approval. The settlement called for promotion of all of the candidates on the original eligible list and the successive promotion of black and Hispanic candidates who had taken the Sergeant's Examination until the disparate effect of the examination was eliminated. The settlement was conditionally accepted by the district court on February 7, 1986. See Stipulation of Settlement and Order, dated February 7, 1986, entered in Hispanic Society of the New York City Police Dep't v. New York City Police

Dep't, 84 Civ. 6628 (RLC) ("Stipulation").

On April 17, 1986, following notice to the members of the class, a hearing was held regarding the terms of the final settlement. Two individual intervenors filed objections to the settlement. In addition, at the hearing, objections were made by officers who were not on the eligible list but who claimed to have received scores equal to or higher than the black and Hispanic officers to be promoted pursuant to the settlement. Although these officers were not parties to the lawsuit, their attorney (who is also representing plaintiffs in this case) was permitted to argue at the hearing that the proposed settlement violated their right to equal protection of the laws. Judge Carter filed an opinion approving the settlement on June 16, 1986. Hispanic Society of the New York

City Police Dep't v. New York City Police Dep't, 42 Fair Empl. Prac. Cas. (BNA) 905, 40 Empl. Prac. Dec. (CCH) P36,385 (S.D.N.Y. 1986). Three hundred and fifty of the non-party objecting police officers appealed the decision.

On December 30, 1985, suit was filed by a number of police officers who were not placed on the eligible list but who scored at least as high as the lowest scoring minority officer promoted under the interim order. n1 In that case, Marino v. Ortiz, plaintiffs argued that the proposed settlement deprived them of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. Present counsel for plaintiffs was also counsel for plaintiffs in Marino. The case was assigned to Judge Carter, who dismissed the complaint on April 24, 1986.

On December 8, 1986, the Court of Appeals for the Second Circuit issued

decisions in Hispanic Society and Marino. The appeal in Hispanic Society was dismissed because appellants in that case were not parties to the litigation, and therefore, lacked standing to prosecute the appeal. Hispanic Society of the New York City Police Dep't v. New York City Police Dep't, 806 F.2d 1147, 1154 (2d Cir. 1986). The Court of Appeals noted that the Hispanic Society appellants' lack of standing stemmed from "their steadfast refusal to comply with the requirements of intervention set forth in Fed.R.Civ.P. 24," and formally intervene in the case. Id. at 1153-54. The dismissal of the complaint in Marino was affirmed on the ground that the suit constituted an impermissible collateral attack on a consent decree. Marino v. Ortiz, 806 F.2d 1144, 1147 (2d Cir. 1986). The Court of Appeals in Marino pointed out that appellants not only

had notice of the proceedings in Hispanic Society, but actually presented their claims at the fairness hearing held in that case. The Second Circuit's decision in Marino was affirmed by an equally divided Supreme Court, and its decision in Hispanic Society was upheld. Marino v. Ortiz, 484 U.S. 301, 304, 98 L. Ed. 2d 629, 108 S. Ct. 586 (per curiam), reh'g denied, 484 U.S. 1082, 98 L. Ed. 2d 1026, 108 S. Ct. 1064 (1988).

The following term the Supreme Court, in Martin v. Wilks, 490 U.S. 755, 769, 104 L. Ed. 2d 835, 109 S. Ct. 2180 (1989), held that a non-party's challenge to actions taken pursuant to a consent decree does not constitute an impermissible "collateral attack" on the decree. The Marino plaintiffs then moved in the Second Circuit for an enlargement of time in which to file a petition for rehearing. The Second Circuit denied the request, stating,

"the motion for enlargement of time is nothing but an attempt to reopen a final judgment because of a subsequent change in the law." Marino v. Ortiz, 888 F.2d 12, 13 (2d Cir. 1989), cert. denied, 495 U.S. 931, 110 S. Ct. 2172, 109 L. Ed. 2d 501 (1990). The Court noted that plaintiffs in that case had made no showing of a manifest or intolerable injustice: Indeed, they were fully aware of the proceedings leading up to the consent decree in question, and, viewing the proceedings as a whole, it is evident that this collateral attack was necessitated in part by their counsel's mistaken belief that they were parties to the class action. Id.

In addition to the federal lawsuits described above, several proceedings were brought in New York state court challenging the scoring of the Sergeant's Examination under state laws governing civil service examinations. A

number of these proceedings were consolidated, and subsequently the state court held that alternative answers were to be considered correct with respect to several questions on the examination. Allen v. Ortiz, 137 A.D.2d 424, 524 N.Y.S.2d 442 (App. Div. 1988). As a result of the ruling in Allen, the Sergeant's Examination was rescored and a new eligible list compiled. Black police officers made up 3.94% of the revised eligible list, while Hispanic officers comprised 5.56% of the revised list. See Affidavit of Francis Smith, filed July 22, 1991 at P4. Promotions were made pursuant to this list in or around May 1988. Additional black and Hispanic police officers were then promoted in order to maintain the proportion of minority police officers promoted pursuant to the Hispanic Society settlement. n2

Plaintiffs commenced the instant action on March 9, 1990, claiming that they were denied equal protection of the laws because they were not promoted to sergeant when their scores on the Sergeant's Examination were at least equal to some of the black and Hispanic police officers who were promoted. Plaintiffs argue that the Hispanic Society consent decree does not constitute a valid defense to the denial of their right to equal protection, because plaintiffs were not parties to that consent decree. Defendants contend that the challenged promotions were made pursuant to a valid consent decree, and that the Wilks decision did not overrule pertinent Supreme Court precedent permitting race-conscious remedies under certain circumstances. In addition, defendants argue that many of the plaintiffs are barred from proceeding in this case due

to their participation in the Marino litigation.

DISCUSSION

The standards for granting summary judgment in this Circuit are well-established. A court may grant this extraordinary remedy only when it is clear both that no genuine issue of material fact remains to be resolved at trial and that the movant is entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P. In deciding the motion, the Court is not to resolve disputed issues of fact, but rather, while resolving ambiguities and drawing reasonable inferences against the moving party, to assess whether material factual issues remain for the trier of fact. Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986) cert. denied, 480 U.S. 932, 94 L. Ed. 2d 762, 107 S. Ct. 1570 (1987) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

247-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505, 2509-11 (1986)). Only where the entire record would inevitably lead a rational trier of fact to find for the moving party is summary judgment warranted. National Railroad Passenger Corp. v. City of New York, 882 F.2d 710 (2d Cir. 1989). While the party seeking summary judgment bears the burden of demonstrating the lack of material factual issues in dispute, Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9 (2d Cir. 1983), "the mere existence of factual issues -- where those issues are not material claims before the court -- will not suffice to defeat a motion for summary judgment." Quarles v. General Motors Corp. 758 F.2d 839, 840 (2d Cir. 1985) (per curiam).

Although the movant faces a difficult burden to succeed, motions for summary judgment, properly employed, permit a court to terminate frivolous claims and

defenses, and to concentrate its resources on meritorious litigation. Knight v. U.S. Fire Ins. Co., supra, 804 F.2d at 12. The motion then: is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Pro. 1 . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis. Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548, 2555 (1986).

As noted above, the parties in the instant case have each moved for summary judgment. Cross-motions for summary judgment, however, do not warrant the granting of summary judgment unless the Court finds that "one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed." Frouge Corp. v. Chase Manhattan Bank, 426 F. Supp. 794, 796 (S.D.N.Y. 1976). See also Bank of Am. Nat'l Trust and Sav. Ass'n v. Gillaize: ɹ, 766 F.2d 709, 716 (2d Cir. 1985); Home Ins. Co. v. Aetna Casualty and Surety Co., 528 F.2d 1388, 1390 (2d Cir. 1976).

I. Standing

Plaintiffs argue that they have been damaged due to Municipal Defendants' failure to adhere to the order of scores generated by the Sergeant's Examination in making promotion decisions. Although none of the parties appears to have

raised the question of plaintiffs' standing to contest the effects of the Hispanic Society consent decree, federal courts have an independent obligation to examine their own jurisdiction and "standing is perhaps the most important of the jurisdictional doctrines." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990) (quoting Allen v. Wright, 468 U.S. 737, 750, 82 L. Ed. 2d 556, 104 S. Ct. 3315, 3324 (1984)). The Court will therefore address the question of standing.

None of plaintiffs in this action scored high enough on the Sergeant's Examination to be placed on the original list of those eligible for promotion, which numbered approximately 1,000. In order to comport with the Hispanic Society consent order, Municipal Defendants ultimately promoted more officers who took the Sergeant's

Examination than those who were originally placed on the eligible list. This process was repeated after the Allen litigation resulted in a revised eligible list. Plaintiffs claim that the fact that their scores were at least equal to the scores of the officers who were promoted demonstrates that they suffered an injury at the hands of Municipal Defendants. However, plaintiffs had no legitimate expectation of obtaining promotions based on their scores alone.

Plaintiffs' only basis for claiming an expectation of promotion is that Municipal Defendants in fact promoted some officers whose scores fell below the eligibility cutoff for promotion. The only plaintiffs who may therefore legitimately claim to have been harmed are those who would actually have been promoted had Municipal Defendants strictly followed the order of scores on

the Sergeant's Examination in determining which officers whose scores fell below the cutoff would be promoted. n3 The remaining plaintiffs are without standing to proceed in this case, and their claims are accordingly dismissed.

II. Res Judicata

Under the doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Saud v. Bank of New York, 929 F.2d 916, 918 (2d Cir. 1991) (quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2424, 2427 (1981)). It is undisputed that over fifty of the plaintiffs in this lawsuit were also parties in the Marino litigation.

Although the substantive law has changed since Marino was decided, the issues that were litigated in that case

are identical to the issues raised here. The complaint in Marino states the same claim as the complaint in the instant case.

Indeed, large portions of the two complaints are virtually identical. The existence of a final judgment in the prior case has also clearly been demonstrated. Judge Carter dismissed the complaint in Marino on the ground that it was an impermissible collateral attack on a consent decree, and the dismissal was subsequently affirmed by the Second Circuit and the Supreme Court.

The subsequent Supreme Court decision in Wilks, holding that a collateral attack on a consent decree is permissible, does nothing to change the preclusive effect of the decision in Marino. It is well settled that the res judicata consequences of a final judgment are not affected by the fact

that the judgment may have rested on a legal principle that was subsequently overruled in another case. Federated Dep't Stores, Inc. v. Moitie, supra, 452 U.S. at 398.

Accordingly, those plaintiffs who previously asserted claims in Marino, challenging the Hispanic Society consent decree are barred by the principle of res judicata from proceeding here and their claims must be dismissed.

III. The Effect of the Ruling in Martin v. Wilks.

Prior to the Supreme Court's decision in Martin v. Wilks, the rule in this Circuit, as in most others, was that collateral attacks on consent decrees entered in Title VII actions were not permitted. Marino v. Ortiz, supra, 806 F.2d at 1146. See also Martin v. Wilks, supra, 490 U.S. at 762-63 n. 3 (listing cases). The Supreme Court in Wilks rejected the "impermissible collateral

attack" rule, and upheld a decision by the Eleventh Circuit allowing a group of white fire-fighters to litigate the merits of their claim that race-conscious promotion decisions made in reliance on consent decrees violated the Constitution and Title VII.

Although plaintiffs' reading of Wilks is somewhat difficult to discern, they apparently regard that decision as requiring this Court to ignore the consent decree entered in Hispanic Society in deciding their claims in the instant lawsuit. Plaintiffs reason that because they were never parties to the Hispanic Society litigation, not only are they not bound by the consent decree, but in addition, the consent decree may not be used in any way affecting them. Thus, plaintiffs argue that they are entitled to summary judgment, since defendants have admitted to making promotion decisions which

deviate from the order of scores generated by the Sergeant's Examination and, according to plaintiffs, the Court may not consider the existence of the consent decree in determining whether or not plaintiffs' right to equal protection of the laws has been violated by such decisions.

Plaintiffs misconstrue the decision in Wilks. The Supreme Court held in Wilks that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." 490 U.S. at 762. The result of the ruling in Wilks is that a non-party to a consent decree has the right to a decision on the merits of his claim challenging the validity of decisions made pursuant to that consent decree, see United States v. Internat'l Brotherhood of Teamsters, 931 F.2d 177, 185 (2d Cir. 1991), not that consent

decrees should be viewed as a nullity as regards all nonparties.

In addition, although plaintiffs have repeatedly stated that they do not intend to bring a reverse discrimination claim here, it is worth noting that the Wilks decision does not alter the substantive law to be applied in cases involving equal protection challenges to race-conscious remedial measures. The Eleventh Circuit decision affirmed by the Supreme Court in Wilks directed the district court to decide the merits of the plaintiffs' claims, applying precedent governing reverse discrimination claims. In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1500-01 (11th Cir. 1987). Nothing in Wilks suggests that claims involving a collateral attack on a consent decree should be exempted from the Supreme Court teachings onrace- conscious remedies. A

recent Eighth Circuit decision in a case similar to the one at bar reached the same conclusion regarding the effect of the Wilks decision: While Wilks permits a nonparty to challenge the validity of employment decisions made pursuant to a consent decree, it does not speak to whether a particular race-conscious employment decision taken pursuant to a consent decree will meet constitutional standards. Donaghy v. City of Omaha, 933 F.2d 1448, 1457 (8th Cir. 1991).

In order to prevail in this litigation, plaintiffs must do more than demonstrate that they are entitled to proceed on the merits of their claim. They must also show that they were not promoted as a result of a settlement agreement which fails to meet constitutional standards.

IV. Equal Protection Standards Applicable to the Consent Decree.

Plaintiffs insist that theirs is not a claim of reverse discrimination. According to plaintiffs, their equal protection rights have been violated not because of Municipal Defendants' use of racial criteria in making promotions to police sergeant, but solely because of the failure to make those promotions based on the scores derived from the Sergeant's Examination.

It is well established that when a state employs a classification which involves neither a suspect criterion nor a fundamental right, "that classification violates the equal protection clause only if it has no reasonable' or 'rational' basis." Castellano v. Board of Trustees of the Police Officers' Variable Supplements Fund, 937 F.2d 752, 755 (2d Cir.), cert. denied, 116 L. Ed. 2d 329, 112 S. Ct. 378 (1991). Here, according to the argument advanced by plaintiffs,

Municipal Defendants effectively created two classes of individuals when they settled the Hispanic Society litigation: officers who were promoted under the terms of the settlement and those who have equal or better scores and were not promoted.

In order to overcome an equal protection challenge to which the "rational basis" standard of review applies, defendants need only demonstrate that the Hispanic Society settlement was rationally related to a legitimate state interest. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461-63, 66 L. Ed. 2d 659, 101 S. Ct. 715, 722-23 (1981). Municipal Defendants' decision to settle the Hispanic Society litigation at the close of discovery was based on their informed assessment of the likelihood that plaintiffs would ultimately prevail, as well as a balancing of the costs of

continued litigation against the benefits of immediate settlement. Absent allegations of fraud or collusion between the parties, a decision to settle a lawsuit is clearly a legitimate state purpose. The promotions that resulted from the Hispanic Society settlement were reasonably related to that purpose, and therefore satisfy the rational basis test. Moreover, the Hispanic Society settlement meets the much higher strict scrutiny standard which plaintiffs have, for unknown reasons, declined to invoke.

The legal standards applicable to a consent decree which embodies a race-based remedy and to which a public employer is a party are analogous to those used in determining the validity of a public employer's affirmative action plan. A voluntary, race-conscious affirmative action plan does not violate constitutional

standards if it is narrowly tailored to serve a compelling state interest. Wygant v. Jackson Board of Education, 476 U.S. 267, 274, 90 L. Ed. 2d 260, 106 S. Ct. 1842, 1847 (1986) (plurality); Barhold v. Rodriguez, 863 F.2d 233, 237-38 (2d Cir. 1988). A public employer is justified in undertaking an affirmative action program if it does so to remedy a history of past discrimination. United States v. Paradise, 480 U.S. 149, 167, 94 L. Ed. 2d 203, 107 S. Ct. 1053, 1064 (1987) (plurality opinion).

An employer need not make findings it has engaged in illegal discrimination before it may adopt an affirmative action plan, but it must have a "firm basis for believing that remedial action is required." Barhold v. Rodriguez, supra, 863 F.2d at 236 (quoting Wygant v. Jackson Board of Education, supra, 476 U.S. at 286). In order to uphold the

constitutionality of a voluntary affirmative action program, a court must make a factual determination that the employer has a "strong basis in evidence for its conclusion that remedial action was necessary." Id.

Here, the remedial action at issue was taken pursuant to a consent decree which was subjected to review and approval by the district court before it was permitted to take effect. Although the settlement agreement contains a disclaimer of liability on the part of the city, it also states that the Sergeant's Examination adversely affected black and Hispanic candidates for promotion and that the city had concluded that there "would be a substantial risk" that it would not be able to prevail in defending the examination as job related. Stipulation at 6. In addition, Judge Carter's opinion approving the settlement notes

that "a cursory look at the statistics . . . shows a prima facie adverse discriminatory impact on [blacks and Hispanics] . . . and serves as a sufficient predicate for settlement based on race-conscious remedies." Hispanic Society of the New York City Police Dep't v. New York City Police Dep't, supra, 42 Fair Empl. Prac. Cas. (BNA) at 908.

The statements contained in the Hispanic Society stipulation, as well as the contemporaneous findings of the district court at the time the settlement agreement was approved amply serve to justify the use of a race-conscious remedy to settle the Hispanic Society litigation. It is well settled that a statistical disparity sufficient to support a prima facie claim under Title VII provides a firm basis for the implementation of a race-conscious remedy. Wygant v.

Jackson Board of Education, supra, 476 U.S. at 292 (O'Connor, J., concurring); Johnson v. Transportation Agency, 480 U.S. 616, 632, 94 L. Ed. 2d 615, 107 S. Ct. 1442, 1452 (1987); Id. at 649 (O'Connor, J. concurring in judgment).

Plaintiffs contend that the changes in the eligibility list resulting from the Allen litigation undermine the basis for the district court's approval of the settlement agreement in Hispanic Society. Even assuming, however, that in deciding plaintiffs' claims here, the Court is required to consider factual developments which occurred after the Hispanic Society settlement was approved, it is clear that the adverse impact of the Sergeant's Examination on minority candidates for promotion was not eliminated when the revised eligibility list was compiled. The Court therefore concludes that the inclusion of a race-conscious remedy in

the Hispanic Society settlement was justified by a compelling state interest.

Once a court concludes that a race-conscious remedy is justified, it next must examine the manner in which such a remedy is implemented, to ensure that it is sufficiently narrowly tailored. To determine if an affirmative action plan is narrowly tailored, a court must consider the necessity of the relief and the efficacy of alternative remedies; the flexility and duration of the relief, including the availability of waiver povisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties. Barhold v. Rodriguez, supra, 863 F.2d at 238 (quoting United States v. Paradise, supra, 480 U.S. at 171.)

Here, the Hispanic Society settlement relates exclusively to the eligibility

list derived from the Sergeant's Examination, which is only in force for a limited period of time. As noted by Judge Carter, "the settlement protects the interests of those who passed the test and were placed on the eligible list while at the same time alleviating the disparate impact the test inflicted on minority members," Hispanic Society of the New York City Police Dep't v. New York City Police Dep't, supra, 42 Fair Empl. Prac. Cas. (BNA) at 908, since it provides that all those officers who received passing grades on the Sergeant's Examination would receive promotions. The only beneficiaries of the settlement are the minority officers who were affected by the examination's disparate impact, and thus the settlement is not overinclusive. See Richmond v. J. A. Croson Co., 488 U.S. 469, 506-08, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989). The Court therefore

concludes that the Hispanic Society settlement is sufficiently narrowly tailored to meet its remedial purpose.

Having determined that the challenged promotions took place pursuant to a consent decree which meets constitutional standards -- either those put forward by plaintiffs or the more rigorous standards applicable to consent decrees employing racial criteria -- the Court concludes that those promotions were fully justified and that Municipal Defendants and Intervenors are accordingly entitled to summary judgment.

V. Sanctions

Municipal Defendants and Intervenors argue that plaintiffs' counsel acted frivolously in naming over 50 persons as plaintiffs in this lawsuit who are clearly barred from proceeding here by virtue of their participation in the

Marino litigation. Defendants argue that they should not be required to bear the costs of defending these frivolous claims. In addition,

Intervenors seek sanctions with respect to all of plaintiffs' substantive claims. In response, plaintiffs contend that Marino was dismissed on procedural grounds, and that therefore the plaintiffs in that case are not barred from relitigating the substantive claims raised there. Plaintiffs also urge the Court to declare Rule 11 of the Federal Rules of Civil Procedure unconstitutional as applied when it is used to award sanctions against attorneys who sue governmental agencies.

While the imposition of sanctions under Rule 11 is mandatory when a claim has absolutely no chance of success, n4 the Court is to avoid hindsight review of the claim, to resolve all doubts in favor of the signerand to refrain from

imposing sanctions where such action would stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Motown Productions, Inc. v. Cacomm, Inc., 849 F.2d 781, 785 (2d Cir. 1988); Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986), cert. denied, 480 U.S. 918, 107 S. Ct. 1373, 94 L. Ed. 2d 689 (1987); Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).

There need be no showing of bad faith on the part of the signer of the submission at issue for the imposition of sanctions. Cross & Cross Properties, Ltd. v. Everett Allied Co., 886 F.2d 497, 504 (2d Cir. 1989). Instead, sanctions are appropriate where an attorney's signed submission fails to meet a test of objective reasonableness. McMahon v. Shearson/American Express, Inc., 896 F.2d 17, 22 (2d Cir. 1990); Cross & Cross Properties, Ltd. v.

Everett Allied Co., supra, 886 F.2d at 504. Although other goals for the imposition of sanctions under Rule 11 may exist, for example, punishment for violation of the Rule compensation for victim [sic] of the violation, and deterrence of others, focus should be on the drafters' aim of discouraging dilatory and abusive litigation tactics and eliminating frivolous claims and defenses, thereby speeding up and reducing the costs of the litigation process. Sanctions are the deterrent threat [citation omitted], by which a district court judge may deal with counsel who ignore their broadened responsibility under the amended Rule to forward the effective administration of justice.

McMahon v. Shearson/American Express, Inc., supra, 896 F.2d at 21.

With respect to the inclusion in this lawsuit of plaintiffs whose claims are

barred by the doctrine of res judicata, sanctions are warranted. There is no merit to either argument advanced by plaintiffs in opposition to an award of sanctions. Although the court in Marino did not reach all of the arguments advanced by plaintiffs there, the dismissal in that case was a dismissal on the merits. Moreover, plaintiffs' counsel was fully aware that a final judgment entered in Marino, since he served as counsel for plaintiffs in that case. Indeed, the Second Circuit pointed out that the Marino plaintiffs' were "attempting to reopen a final judgment" when it ruled on their application for an extension of time in which to file a petition for rehearing. Marino v. Ortiz, supra, 888 F.2d at 14. In addition, while it is true, as plaintiffs argue, that they have a constitutional right to petition their government for redress of grievances,

this right does not shield them from sanctions for bringing "unreasonable and groundless" claims against government entities. Eastway Construction Corp. v. City of New York, supra, 762 F.2d at 252.

As to Intervenor's application for sanctions with respect to the substantive claims contained in the complaint, the Court notes that plaintiffs' main claim here is based on their interpretation of a recent Supreme Court decision. While their argument was not ultimately successful, it would be inappropriate for this Court to rule that they acted frivolously in advancing it. Accordingly, sanctions, in the form of attorneys' fees and costs, are awarded to Municipal Defendants and Intervenors only with respect to the issue of res judicata.

CONCLUSION

The claims of those plaintiffs who are without standing to challenge the Hispanic Society consent decree are dismissed. Plaintiffs' motion for summary judgment is denied and the cross-motions of Municipal Defendants and Intervenors for summary judgment are granted, both as to those plaintiffs who are barred from proceeding by virtue of their participation in the Marino action, and as to the balance of the cross-motions, relating to the merits of plaintiffs' claim. Municipal Defendants' and Intervenors' applications for sanctions are granted with respect to the issue of res judicata and Intervenors' application for sanctions is otherwise denied. The Court directs that Municipal Defendants and Intervenors submit affidavits by April 10, 1992 detailing their expenses, including their attorneys' fees, for

work performed on the res judicata issue. Settle judgment on notice.

Dated: New York, New York March 10, 1992

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n1 A number of the plaintiffs in that case are now plaintiffs in the instant action. 785 F. Supp. 467, *472; 1992 U.S. Dist.

n2 The Hispanic Society decree requires that any promotions made pursuant to an eligible list derived from the Sergeant's Examination include sufficient numbers of black and Hispanic officers to insure that the total promotions made with respect to the Sergeant's Examination will reflect the proportion of black and Hispanic test-takers. Stipulation at PPIII.B, III.C.

n3 According to plaintiffs, police officers who were promoted to sergeant as a result of the Hispanic Society litigation received backpay and retroactive seniority, while those who were promoted as a result of the Allen litigation did not. Plaintiffs argue that all officers who were promoted as a result of the Allen litigation have standing to pursue a claim for backpay and retroactive seniority equivalent to that received by the officers promoted pursuant to the Hispanic Society settlement. This claim does not appear in the complaint or in plaintiff's motion papers, but was raised for the first time in a letter to the Court following oral argument. Letter, dated June 26, 1991 from Ronald Podolsky. Therefore, this claim is not properly

before the Court. The only officers promoted as a result of Allen who have standing to proceed here are those who would have been promoted earlier had Municipal Defendants made promotions according to rank order of scores on the Sergeant's Examination.

n4 Rule 11 provides, in pertinent part, that: The signature of an attorney or party constitutes a certificate by the signer
that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost in the litigation . . .If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the of the pleading, motion, or other paper, including a reasonable attorney's fee.

Excerpts of Affirmation of Ronald Podolsky, on the motion for summary judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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[SAME CAPTION]

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16. Meanwhile, during the course of the two litigations some, but not all of the plaintiffs herein instuted an action in Supreme Court, County of New York, in the case of Allen v Ortiz, which was consolidated with a similar case Prescott v Ortiz, Index No. 23662-84, before Justice Blyn. Those cases alleged that some of the answers given to some of the questions by the petitioners in the Allen case were as good as or better than the key answers perceived by the respondent to be the only correct answer to the various questions. On December 18, 1986 Justice Blyn ordered eleven changes to questions

on the techinical knowledge component of the subject examination. The city did not appeal Allen or Prescott.
Allen appealed still further resulted in one additional change.

17. As a result of this State litigation, some, but not all of the Marino plaintiffs, some, but not all of the Costello Objectors in Hispanic, some, but not all of the minorities promoted by reason of the Hispanic settlement and some, but not all of the plaintiffs herein, attained, on their own merits, a passing grade, and a series of promotions resulting therefrom were made, the last, occurring on or about May, 1988.

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28. Summary judgment should be awarded to the plaintiffs because Article V, Section 6 of the New York State Constitution requires promotions in the civil service ranks to be based upon merit and fitness to

be determined insofar as is practicable by a competitive examination. This is the definition of equal protection of the laws in the State of New York insofar as promotions in the Civil service is concerned.

29. In view of the defendants' admission that the plaintiffs have grades equal or higher than persons heretofore promoted to the rank of sergeant, a prima facia case of a denial protection of the laws under the Fourteenth Amendment by persons acting under color of state right has been established.

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37. Since none of the plaintiffs in this case consented to the Consent Decree in Hispanic they are not bound by the Consent Decree,since a Consent Decree by definition binds only those who consent.

38. It should be noted that the Consent Decree in Hispanic was not a judgment after litigation, but was merely an agreement between an employer and some of its employees to settle perceived differences between them. Moreover, the consent Decree did not make any admission on the part of the municipal defendants in Hispanic that they had racially discriminated against minorities.

39. The fact that the decision in the state court in Prescott/Allen, supra, is binding on the municipal defendants herein because they were parties thereto could or should work a collateral estopple on the municipal defendants herein that whatever real or imagined disparity in racial composition of the Eligible List may well have been caused by factors other than racial discrimination.

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